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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/671,640

09/26/2003

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3121.001

7889

7590
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06/17/2008

EXAMINER

PHILOGENE, PEDRO

ART UNIT

PAPER NUMBER

3733

MAIL DATE

DELIVERY MODE

06/17/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/671,640	Applicant(s) GLENN ET AL.	
	Examiner Pedro Philogene	Art Unit 3733	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 29 February 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 9-12, 16-18 and 20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 9-12, 16-18, 20 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 9-11, 16-18, 20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ahlgren (6,852,126) in view of Young et al. (6,190,414).

Shlgren discloses a method for stabilizing of vertebrae adjacent an intervertebral space, the steps including inserting an elongate primary segment (20A) between the vertebrae and inserting an elongate secondary segment (20B) between the vertebrae, with the secondary segment crossing the primary segment, as set forth in column 1, lines 55-57, column 2, lines 1-6, rotating at least one of the segments after at least one of the inserting steps, rotating the elongate primary segment about a long axis thereof after the primary segment inserting step; and rotating the secondary segment about a long axis thereof after the secondary segment inserting step; as set forth in column 2 lines 31-33; the distal end of the segments are spaced from each other and the proximal ends of the segments are spaced from each other; as best seen in the FIGS.; making a first incision at a first implantable site, inserting the first elongate segment, making a second incision at a location spaced from the first incision; and inserting the second elongate segment through the second incision and along a second pathway to the implantation site; as set froth in column 2, lines 16-35.

It is noted that Ahlgren did not teach of configuring the primary and secondary segments to have a greater height between a top surface and a bottom surface than a width between side surfaces thereof; also, expanding a height of at least one of the segment to increase the height of the segment between a top surface and a bottom surface thereof; as claimed by applicant. However, in similar art, Young et al provide the evidence of an elongate segment configures to have a greater height between a top surface and a bottom surface than a width between side surfaces thereof; also, expanding a height of at least one of the segment to increase the height of the segment between a top surface and a bottom surface thereof to define a reduced entry profile to facilitate insertion within the intervertebral space and to define an interior cavity for accommodating bone growth inducing substances.

Therefore, given the teaching of Young et al, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device of Ahlgren, as taught by Young et al to define a reduced entry profile to facilitate insertion within the intervertebral space and to define an interior cavity for accommodating bone growth inducing substances.

Claim 12 is rejected under 35 U.S.C. 103(a) as being unpatentable over Ahlgren (6,852,126) in view of Young et al. (6,190,414) in view of Jackson (6,773,460).

It is noted that the above combination of references did not teach of providing the spreading element in the form of a wedge and a longitudinal bore having a height which is tapered and advancing the wedge would cause the top surface of the segment to move away from the bottom surface of the segment; as claimed by applicant. However,

in a similar art, Jackson provides the evidence of a spreading element that is a wedge and a bore that is tapered to engage the anterior end of the walls and force the walls apart as the spreading member is advanced into the tapered bore.

Therefore, given the teaching of Jackson, it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the device of Ahlgren/Young et al, as taught by Jackson, to engage the anterior end of the walls and force the walls apart as the spreading member is advanced into the tapered bore.

Response to Amendment

Applicant's arguments with respect to claims 9-12, 16- 18, 20 have been considered but are moot in view of the new ground(s) of rejection. Furthermore, the examiner would like to apologize for indicating allowable subject matter in the last office action.

Conclusion

A shortened statutory period for reply to this action is set to expire THREE MONTHS from the mailing date of this action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Pedro Philogene whose telephone number is (571) 272-4716. The examiner can normally be reached on Monday to Friday 6:30 AM to 4:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Eduardo Robert can be reached on (571) 272 - 4719. The fax phone

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number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Pedro Philogene/
Primary Examiner, Art Unit 3733
June 10, 2008